90-193

No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

TONY STEVEN STONE & PATSY ANN DUNN HOLLIDAY
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Has the United States Sentencing Commission unlawfully imposed a sentencing scheme for all controlled substances based upon "gross weight," which conflicts with the Congressional statutory scheme requiring the use of "gross weight" for only those controlled substances listed in Title 21, U.S.C., Section 841(b)(1)(A) and (b)(1)(B), and the use of "net weight" for those controlled substances listed in Title 21, U.S.C., Section 841(b)(1)(C) and (b)(2)?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, TONY STEVEN STONE and PATSY ANN DUNN HOLLIDAY, respectfully pray that a writ of certiorari issue to review the unreported opinion of the United States Court of Appeals for the Fourth Circuit in the matter of *United States v. Tony Steven Stone & Patsy Ann Dunn Holliday* (No. 89-5571), which affirmed the judgments of conviction and sentence of the United States District Court for the Middle District of North Carolina at Greensboro.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Fourth Circuit in this matter is set forth in the attached appendix (App. A). On April 27, 1990, the

United States Court of Appeals for the Fourth Circuit also denied petitioners' request for a rehearing, which was specifically based upon the issue presented in the instant petition. That petition for rehearing is set forth in the attached appendix (App. B). The District Court did not render a written opinion in this matter, but the issue of law presented herein was specifically addressed at the time of petitioners' sentencing hearings.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, U.S.C. § 1254(1) on the ground that their rights under the due process clause of the Fifth Amendment of the United States Constitution were violated.

The instant petition for Writ of Certiorari is being filed within 90 days of an order denying a petition for rehearing of an opinion of the United States Court of Appeals for the Fourth Circuit, the latter of which affirmed the judgments and sentences of incarceration entered before the United States District Court for the Middle District of North Carolina at Greensboro, North Carolina.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment of the Constitution of the United States, states *inter alia:*

> "No person shall . . . be deprived of life, liberty or property without due process of law . . . "

Title 21, U.S.C. § 841 was invoked in part by petitioners before both the trial court and the Court of Appeals in this matter as a basis for invalidating the sentencing guideline established for the crimes for which petitioners

pleaded guilty. As the relevant portions of this statute are lengthy, petitioners have set them out in the attached appendix. In Appendix C are the provisions applicable for the contraband in petitioners' case. Petitioners contend that the United States Sentencing Commission, the trial court, and the Appellate Court improperly relied upon the provisions of Title 21, U.S.C. § 841 which are set out in Appendix D.

I.

STATEMENT OF THE CASE

On September 26, 1988, petitioners were named with three others in a 7-count indictment relating to the unlawful distribution of Dilaudid (hydromorphone hydrochloride), a schedule II narcotic controlled substance, and Diazepam (generic Valium), a schedule IV non-narcotic controlled substance. Both petitioners pleaded guilty to Count I of the indictment, which charged conspiracy to possess these controlled substances with intent to distribute, pursuant to Title 21, U.S.C. §§ 841(a)(1) and 846. Both petitioners were sentenced before the Honorable Frank W. Bullock, Jr., United States District Judge for the Middle District of North Carolina. Petitioner STONE was sentenced on March 2, 1989 to a term of imprisonment of 27 months. Petitioner HOLLIDAY was sentenced on March 15, 1989, and was committed for a term of imprisonment of 33 months.

Prior to their sentencing, petitioners filed legal memoranda which, among other things, challenged the lawfulness of the sentencing guidelines applicable to their case on the grounds that the offense level was erroneously calculated based upon the gross weight, as opposed to the net weight, of the pharmaceutical drugs at issue.

On appeal of their sentences and judgments to the United States Court of Appeal for the Fourth Circuit, petitioners claimed in part this same infirmity of the sentencing guidelines. Following the circuit court's affirmance (See Appendix A, pgs. 1-5), petitioners requested a rehearing before the Court of Appeals, claiming that the court had overlooked a material point of law in its reading of the sentencing statute at issue. (Appendix B) On April 27, 1990, the Fourth Circuit Court of Appeals denied petitioners' request for a rehearing, and the instant petition is now sought to review that judgment.

II.

STATEMENT OF FACTS

The charges against petitioners arose out of the seizure pursuant to a warrant of two boxes which had been delivered by the United States Postal Service. Within these boxes were found 231 tablets of Dilaudid, and 20,000 tablets of Diazepam. The 231 tablets of Dilaudid consisted of 182 tablets of 2 mg. strength and 49 tablets of 4 mg. strength. Each 2 mg. tablet of Dilaudid weighed 88 mgs., while each 4 mg. tablet of Dilaudid weighed 90 mgs. Thus, the gross weight of the Dilaudid tablets, including both the inert as well as active ingredient, was roughly 36 times the weight of the actual controlled substance involved.

Similarly, of the Diazepam seized in this case, there were 7,000 tablets of 10 mg. strength and 13,000 tablets of 5 mg. strength. Each Diazepam tablet, regardless of its potency, weighed 170 mgs. Thus, the gross weight of the tablets was 25 times that of the actual weight of the Diazepam charged against petitioners.

Petitioners' sentences were based upon the total gross weight of 3,420.426 grams of Dilaudid and Diazepam, for a heroin equivalency under the guidelines of 51.49 grams. (See Federal Sentencing Guidelines Manual, pgs. 73-76) This equates under the sentencing guidelines to an offense level of 20. (Federal Sentencing Guidelines Manual, pg. 69) Petitioners' calculation of the offense level based solely upon the net weight of the controlled substances involved resulted in the conclusion that their offense level should be no greater than level 12, which provides for a 10 to 16 month range of imprisonment, as opposed to a 33 to 41 month range of imprisonment. Petitioners' calculation of their offense level would also make them available for a "split sentence", which was not available under the calculations actually used at their sentencing. (See Federal Sentencing Guidelines Manual, §§ 5C1.1(c)(3)(d)(2)).

III.

REASONS FOR GRANTING WRIT

Petitioners' maintain that they were unlawfully incarcerated, because the United States Sentencing Commission Guidelines, which were used to calculate each of their terms of incarceration, conflict with the plain language of the Congressional sentencing scheme for the offense to which they pleaded guilty. Specifically, petitioners find fault with the United States Sentencing Commission's method of calculating offense levels based upon the gross weight of Dilaudid and Diazepam in this case, as opposed to the net weight of those controlled substances.

The United States Sentencing Commission's methodology, and the basis for that methodology, have not been precisely set out. In a footnote to the drug quantity table, the Sentencing Commission stated that "the scale amounts for all controlled substances refer to the total

weight of the controlled substance." The Commission went on to state that consistent with the provisions of the "Anti-Drug Abuse Act," "if any mixture or compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity." Federal Sentencing Guidelines Manual, 1987 Edition, fn. pg. 59. In the 1990 edition of the Federal Sentencing Guidelines Manual, the Commission deleted any reference to "scale amounts for all controlled substances", and instead stated that "the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Federal Sentencing Guidelines Manual, 1990 Edition, fn. pg. 71. In Commentary No. 10, which follows the drug quantity table set forth in § 2D1.1(c) of the Guidelines, the Commission states that the statutory basis for the sentences it provided for drug offenses is derived from Title 21, U.S.C. § 841(b)(1). Federal Sentencing Guidelines Manual, 1990 Edition, pg. 73.

This statutory derivation is relied upon despite the Commission's recognition that that statute provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, Fentanyl, LSD, and marijuana. Moreover, what is not recognized by the Sentencing Commission in relying upon the language "a mixture or substance containing a detectable amount", is that Congress did not utilize that language for all controlled substances. Congress provided a sentencing scheme based upon that language only for certain substances, namely those just previously mentioned. Others, such as the Diazepam and Dilaudid involved in petitioners' case, were not penalized based upon "a mixture or substance containing a detectable amount" of controlled

substance. This dichotomy is set out in the attached appendices, C and D.

The United States Sentencing Commission, although placed by Congress in the judicial branch, is not a court and does not exercise judicial power. Rather, the Commission is an "independent" body vested by Congress with a legislative responsibility for establishing minimum and maximum penalties for every crime. *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 101 L.Ed.2d 714 (1989). Nonetheless, because the sentencing guidelines promulgated by the United States Sentencing Commission have not been passed by Congress pursuant to bicameralism and presentation, *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), the guidelines are not legislation.

The United States Sentencing Commission was instructed to promulgate guidelines consistent with Title 28, U.S.C. § 994 and Title 18, U.S.C. § 3553. Therefore, to the extent that the Sentencing Guidelines are inconsistent with the United States Sentencing Commission's enabling act, the guidelines are invalid, and therefore, not binding on the sentencing court. *United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977); *Securities & Exchange Commission v. Sloan*, 436 U.S. 103, 111-112, 117, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978). A regulation which operates to create a rule out of harmony with Congressional enactment is a mere nullity. *Manhattan General Equipment Company v. Commissioner*, 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed.2d 528 (1936). *See*, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-214, 96 S.Ct. 1375, 1391, 47 L.Ed.2d 668 (1976); *Dixon v. United States*, 381 U.S. 68, 74, 85 S.Ct. 1301, 1305, 14 L.Ed.2d 223 (1965).

When Congress has spoken directly to a question and its intent is clear, an agency like the United States Sentencing Commission must give effect to that intent. *Chevron, U.S.A., Inc. v. Natural Resources Defense,* 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984); *Board of Government of the Federal Reserve System v. Dimension Financial Corp.,* 474 U.S. 361, 368, 106 S.Ct. 681, 685-686, 88 L.Ed.2d 691 (1986).

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear Congressional intent. *Chevron, U.S.A., Inc. v. Natural Resources Defense, supra,* 467 U.S. 837, at 843, fn. 9. The agency's own interpretation of the statute does not control in circumstances of clear Congressional intent. *SEC v. Sloan, supra,* 436 U.S. at 117-118. The intent of Congress is determined by looking at the language of the statute, the scheme of the statute and the legislative history. *United States v. Larinoff, supra,* 431 U.S. at 873.

The Congressional language "a mixture or substance containing a detectable amount", upon which the United States Sentencing Commission bases its methodology of offense level computation for all controlled substances first appeared in the Controlled Substances Penalties Amendments Act of 1983. Pub.L. 98-473 Title V, §§ 224(a) 502, 503(b)(1), (2) October 12, 1984, 98 Stat. 2030, 2068, 2070. Prior to the enactment of that law, the severity of the penalties described in Title 21, U.S.C. § 841 depended, with but one exception, solely on the scheduling of the controlled substance involved, and in the case of a controlled substance in Schedule I or II, on whether the controlled substance was a "narcotic drug." At that time the only instance in which the amount of

controlled substance influenced the severity of the penalty was in the case of marijuana.

The primary features of Title 21, U.S.C. § 841 which were changed by the Controlled Substances Penalties Amendments Act of 1983 was to designate "particularly dangerous drugs" and to prescribe higher penalties, by use of minimum mandatory terms of incarceration, than those previously proscribed. S.Rep.No.98-225, August 4, 1983, pg. 258; U.S. Code Congressional & Administrative News, 1984, pg. 3440. Thus, as mentioned previously, specifically enumerated controlled substances were singled out by Congress for special treatment at time of sentencing. In the process, Congress determined that sentences for violations of Title 21, U.S.C. § 841(a) for those specifically enumerated substances should be treated without regard to purity, using the language, "a mixture or substance containing a detectable amount of" the enumerated drug or narcotic. Since the time of this amendment, Congress has revisited and amended these provisions of law, has not applied that particular language to any other controlled substances, like Dilaudid and Diazepam, and it has decided not to provide minimum mandatory penalties based upon the quantity of other controlled substance. *See,* Pub.L. 99-570, Title I, § 1005(a), October 27, 1986, 100 Stat. 3207-6; Pub.L. 99-570, Title I, §§ 1002, 1003(a), 1004(a), 1103, Title XV, § 15005, October 27, 1986, 100 Stat. 3207-2, 3207-5, 3207-6, 3207-11, 3207-192; Pub.L. 100-690, Title 6, §§ 6055, 6254(h), 6452(a), 6470(g)(h), 6479, November 18, 1988, 102 Stat. 4318, 4367, 4371, 4378, 4382.

Several circuits have been presented with challenges identical to the one presented in the instant petition, but those have primarily dealt with controlled substances for which Congress has applied the language, "a mixture or

substance containing a detectable amount". *See, United States v. Daley,* 883 F.2d 313 (4th Cir. 1989), *cert. den.,* ____ U.S. ____, 110 S.Ct. 2622 (1990) (LSD); *United States v. Skelton,* 901 F.2d 1204 (4th Cir. 1990) (PCPy); *United States v. Taylor,* 868 F.2d 125 (5th Cir. 1989) (LSD); *United States v. Baker,* 883 F.2d 13 (5th Cir.) *cert. den.,* ____ U.S. ____, 110 S.Ct. 517, 107 L.Ed.2d 518 (1989) (methamphetamine); *United States v. Mueller,* 902 F.2d 336, 345 (5th Cir. 1990) (methamphetamine); *United States v. Elrod,* 898 F.2d 60 (6th Cir. 1990), petition for cert filed, May 31, 1990, No. 89-7689 (LSD); *United States v. Rose,* 881 F.2d 386 (7th Cir. 1989) (LSD); *United States v. McGeehan,* 824 F.2d 667 (8th Cir. 1987), *cert. den.,* 484 U.S. 1061, 108 S.Ct. 1017, 98 L.Ed.2d 92 (1988) (LSD); *United States v. Bishop,* 704 F.Supp. 910 (N.D.Iowa 1989), *aff'd,* 894 F.2d 981 (8th Cir. 1990), petition for cert filed June 6, 1990, No. 89-7708 (LSD); *United States v. Marshall,* 706 F.Supp. 650 (C.D. Ill. 1989) (LSD).

Not surprisingly, none of the above cases discussed the sentencing dichotomy which exists in Title 21 U.S.C. § 841(b) surrounding the use of the language "a mixture or substance containing a detectable amount", because that language applies directly to the controlled substances involved in those cases.

Counsel has discovered three appellate court decisions dealing with controlled substances for which Congress has not employed that language. In *United States v. Gurgiolo,* 894 F.2d 56 (3d Cir. 1990), *rehearing denied* February 13, 1990, the Appellate Court overturned a District Court ruling that the offense level under the drug quantity table for Schedule II drugs should be based upon net weight. The Appellate Court recognized that a sentencing dichotomy exists with respect to the use of the

language "a mixture or substance containing a detectable amount", but misquoted Title 21, U.S.C. § 841(b)(1)(C) (see Appendix C herein) by omitting the word "except" as it applied to the Schedule II drugs that Congress had determined should be treated without regard to the net weight of that controlled substance. Thus, the *Gurgiolo* court improperly rewrote the statute in contravention of Congressional intent, reasoning that if Congress had treated cocaine (a Schedule II drug) without regard to net weight, there was no reason that other Schedule II drugs should not be treated similarly, despite an explicit statutory scheme to the contrary. In *United States v. Meitinger*, 901 F.2d 27 (4th Cir. 1990), the identical issue raised in this petition was treated summarily by the court with citation to *United States v. Daley, supra.* The *Daley* case of course dealt with LSD, for which Congress applied the language, "a mixture or substance containing a detectable amount", and the *Meitinger* opinion does not mention the sentencing dichotomy argued herein. In *United States v. Bayerle,* 898 F.2d 28 (4th Cir.), petition for certiorari filed, June 7, 1990, No. 89-1934, the Fourth Circuit also dealt with this issue, but again there was no mention in that opinion of the Congressional distinction first established by Congress in the Controlled Substances Penalties Amendments Act of 1983.

Undoubtedly, Congress can base sentencing on the quantity of a drug without regard to purity, because it is reasonably related to the proper legislative purpose of penalizing large volume drug traffickers more harshly. *See United States v. Whitehead,* 849 F.2d 849, 859-60 (4th Cir.) *cert. den.* ____ U.S. ____, 109 S.Ct. 534, 102 L.Ed.2d 566 (1988); *United States v. Klein,* 860 F.2d 1489, 1501 (9th Cir. 1988); *United States v. Holmes,* 838 F.2d 1175, 1177 (11th Cir.) *cert. den.,* 486 U.S. 1058, 108 S.Ct. 2829, 100 L.Ed.2d 930 (1988). This was exactly the object of the

Congressional amendments to Title 21, U.S.C. § 841(b) when Congress utilized the language "a mixture or substance containing a detectable amount". *United States v. McGeehan, supra; United States v. Bishop, supra.* However, the United States Sentencing Commission is obviously incorrect in its interpretation that Congress intended sentencing without regard to purity or the amount of carrier mediums for all controlled substances. By making such an interpretation, the United States Sentencing Commission has not only put itself in direct conflict with the clear language of Title 21, U.S.C. § 841(b), it has violated its express mandate that sentences be imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to provide certainty and fairness in meeting the purposes of sentencing, and to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. Title 28, U.S.C. § 991(b); Title 18, U.S.C. § 3553(a).

CONCLUSION

Counsel for petitioners perceive that in terms of the number of cases, the impact of a reversal by this court of petitioners' sentences will not be great. Federal law enforcement resources are directed in large part towards just those controlled substances, such as cocaine, which were singled out by Congress in the 1984 amendments to Title 21, U.S.C. § 841(b). However, the impact is serious for those relatively few individuals who stand convicted of drug offenses for which Congress clearly intended to be treated differently at the time of sentencing. The United States Sentencing Commission's methodology has dramatically, and unlawfully, skewed upward the length of imprisonment for such individuals. For all the foregoing,

then, it is respectfully submitted that the instant petition should be granted.

DATED: July 25, 1990

Respectfully submitted,

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Attorney for Petitioner
PATSY ANN DUNN HOLLIDAY

JAMES B. CRAVEN, III
Attorney for Petitioner
TONY STEVEN STONE

APPENDIX A

APPENDIX A-1

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 89-5562

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

TONY STEVEN STONE,
Defendant-Appellant.

No. 89-5571

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PATSY ANN DUNN HOLLIDAY,
Defendant-Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Durham. Frank W. Bullock, Jr., District Judge. (CR-88-125-D) FILE

Argued: December 8, 1989 Decided: March 29, 1990

Before RUSSELL and MURNAGHAN, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: James B. Craven, III, Durham, North Carolina; David Avrum Elden, Los Angeles, California, for Appellants. Benjamin H. White, Jr., Assistant United

States Attorney, Greensboro, North Carolina, for Appellee. ON BRIEF: Robert H. Edmunds, Jr., United States Attorney, Douglas Cannon, Assistant United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

The appellants, Tony Steven Stone and Patsy Ann Holliday, were charged in Count One of the indictment against them with conspiracy to distribute large quantities of Dilaudid (a morphine-like prescription drug) and Diazepam (generic Valium), in violation of 21 U.S.C. Sections 841(b)(1)(c), 843(b)(2), and 846. Upon a plea of guilty, Stone was sentenced to 27 months' imprisonment and Holliday to 33 months' imprisonment. Each appellant now appeal, as excessive and unconstitutional, the length of the sentence imposed. We affirm.

I.

Patsy Holliday, a pharmacist at a Veteran's Administration hospital in Los Angeles, stole quantities of Dilaudid (a highly addictive painkiller) and Diazepam from her employer and shipped them via the United States mails to Tony Stone for sale and distribution in North Carolina. This enterprise continued between November of 1985 and January of 1988 when federal officials seized two parcels containing 20,000 tablets of Diazepam and 23 tablets of Dilaudid.

During the sentencing phase of this proceeding, argument ensued about both the dosage of the factory packaged pharmaceutical drugs and the applicability of the drug quantity table in Section 2D1.1 of the Federal

Sentencing Guidelines, 18 U.S.C.A. App., a footnote to which explains:

> Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity.

The appellants contend that it was error for the district court to determine the appropriate offense level based on the gross weight of the drugs seized but rather should only consider the actual weight of the Diazepam and Dilaudid contained in each tablet. This argument was rejected by the district court, and the sentence was calculated pursuant to Section 2D1.1 of the Guidelines based on the gross weight of the seized narcotics, even though the weight of the inert distribution medium was heavier than the narcotic itself.

In *United States v. Daly*, 883 F.2d 313 (4th Cir. 1989), the question of whether under Section 2D1.1 a sentence should be calculated on the basis of the weight of the drug itself and the carrier medium was considered. The *Daly* court held that under the plain language of the Anti-Drug Abuse Act, specifically 21 U.S.C. Section 841, and the Sentencing Guidelines, the combined gross weight of the narcotic (in that case lysergic acid diethylamide (LSD)) and any carrier mediums may be used for the purpose of determining base offense levels under Section 2D1.1. Other courts have agreed. In *United States v. Taylor*, 868 F.2d 125, 127-128 (5th Cir. 1989), the Fifth Circuit held that sentencing according to the total weight of the substance containing a detectable amount of narcotic was proper, even though the weight of the distribution medium was generally heavier than the weight of the drug

itself. We now decline to depart from such a ruling and affirm the sentence imposed by the district court.

II.

There are three further contentions set forth by the appellants that we now address briefly. The first is that the Sentencing Guidelines violate the due process clause of the Fifth Amendment. This court has rejected the very constitutional challenge here made. *See, United States v. Bolding*, 876 F.2d 21 (4th Cir. 1989).

Next, the appellants contend that because of the relatively low purity of the narcotics seized, a downward departure from the Guidelines was mandated in this case. Congress has long classified controlled substances without reference to purity. *See* 21 U.S.C. Section 812. The Guidelines, as promulgated in compliance with this long-standing practice, contemplate no downward departure on the basis of low drug purity. Now to read into the statute and allow for such an adjustment would result in an impermissible departure from the sentencing philosophy embodied in Section 2D1.1 — to avoid unwarranted sentencing disparities among those guilty of similar crimes. *See United States v. Daly, supra*; *United States v. Baker*, 883 F.2d 13, 15 (5th Cir. 1989).

Finally, appellant Stone contends that his sentence violated the terms of his plea agreement. In that agreement, both parties stipulated that any active federal time imposed would run concurrently with the three-year state sentence that the appellant was serving at the time of the agreement. However, before the imposition of his federal sentence, appellant was paroled due to prison over-crowding having served only 173 days in the state penitentiary. Accordingly, when sentencing the appellant, the district court reduced the federal sentence by six months (the

equivalent 173 days). We find that such a departure comported with the provisions of the plea agreement.

III.

For the reasons set forth herein, the judgments of conviction of the appellants are hereby

AFFIRMED.

APPENDIX B

Appendix B-1

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Record Nos. 89-5562(L)
and 89-5571

UNITED STATES OF AMERICA,

Appellee,

vs.

TONY STEVEN STONE and
Patsy Ann Holliday,

Appellants.

PETITION FOR REHEARING

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STATEMENT OF COUNSEL

The undersigned counsel of record for Appellants hereby request on their behalf a rehearing in this matter, and it is the judgment of the undersigned that the Court's opinion in this matter overlooks a material point of law with respect to its ruling that the Appellants' sentence under the Federal Sentencing Guidelines was properly calculated based upon the gross weight of the controlled substances in their possession.

ARGUMENT

CONGRESS INTENDED THAT SENTENCING FOR ILLEGAL POSSESSION OF SOME CONTROLLED SUBSTANCE IS TO BE BASED UPON GROSS WEIGHT, AND OTHERS TO BE BASED UPON NET WEIGHT.

In Appellants' opening brief (at pages 3-10), it is argued that there is a distinct legislative dichotomy established by the Anti-Drug Abuse Act of 1984 and codified in 21 U.S.C. 841. The Court's opinion in this case correctly points out that the Sentencing Commission has referred to Section 841 as a basis for the guideline scheme of using gross weight as a basis for sentence for all controlled substances. However, the Sentencing Commission's reading of Section 841 is clearly incorrect. The two subdivisions applicable to the controlled substances which the Appellant possessed, unlike cocaine, PCP, LSD, and certain amounts of marijuana and methamphetamine, do not direct sentences based upon "a mixture or substance containing a detectable amount" of the controlled substance. Compare 21 U.S.C. 841(b)(1)(A) and (B) with 21 U.S.C. 841(b)(1)(C) and (b)(2). In other words, when Congress amended the sentencing scheme for controlled substances in 1984, for

controlled substances such as those involved in the instant matter, there is a clear intent to retain the traditional sentencing scheme based upon net weight.

The two cases cited by the Court are correct in their rulings insofar as the controlled substance involved in those two cases (LSD) is categorized under Section 841 among those controlled substances for which sentencing is based upon gross weight, *United States v. Daly*, 883 F.2d 313 (4th Cir. 1989) and *United States v. Taylor*, 868 F.2d 125 (5th Cir. 1989). Appellant specifically takes issue with the holding from the former case indicating that the "plain language" of the Anti-Drug Abuse Act was correctly adopted by the Sentencing Commission in its formulation that all drug quantity determinations under the guidelines must be based upon gross, as opposed to net, weight. Appellants respectfully contend that the opinion in *Daly*, and the opinion in this case, incorrectly overlook the actual language used by Congress, and there is no recognition by this Court of the sentencing dichotomy established under 21 U.S.C. 841. See e.g. *United States v. Daly, supra*, 883 F.2d at 317.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that rehearing of this matter is appropriate.

This 12th day of April, 1990.

Respectfully submitted,

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APPENDIX C

Appendix C-1

Title 21 U.S.C. Section 841(b)(1)(C) provides in pertinent part:

> In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000.00 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

Title 21 U.S.C. Section 841(b)(2) provides in pertinent part:

> In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both.

APPENDIX D

Appendix D-1

Title 21 U.S.C. Section 841(b)(1)(A) provides in pertinent part:

Except as otherwise provided in Section 845, 845a or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving —

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of —

(I) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) Any compound, mixture, or preparation which contains any quantity of any of the substance referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethy)-4-piperidyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidiny] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both.

Title 21 U.S.C. § 841(b)(1)(B) states in relevant part:

(B) In the case of a violation of subsection (a) of this section involving —

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of —

(I) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) Any compound, mixture, or preparation which contains any quantity of any of the substance referred to in subsection (I) though (III)

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salt, isomers, and salts of its isomers, or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life; a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(2)

No. 90-132

FILED
SEP 27 1990

In the Supreme Court of the United States

OCTOBER TERM, 1990

TONY STEVEN STONE AND
PATSY ANN DUNN HOLLIDAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Sentencing Guidelines' requirement that the base offense level for offenses involving Dilaudid and Diazepam be calculated from the gross weight of the tablets containing the controlled substance, rather than from the net weight of the active ingredients, is consistent with the Controlled Substances Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-193

TONY STEVEN STONE AND
PATSY ANN DUNN HOLLIDAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is unpublished, but the decision is noted at 900 F.2d 257 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1990. A petition for rehearing was denied on April 27, 1990. The petition for a writ of certiorari was filed on July 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following their guilty pleas in the United States District Court for the Middle District of North Carolina, petitioners were convicted on one count of conspiracy to possess Dilaudid and Diazepam with intent to distribute them, in violation of 21 U.S.C. 846. Petitioner Stone was sentenced to 27 months' imprisonment, to be followed by a five-year term of supervised release, and was fined $3,000. Petitioner Holliday was sentenced to 33 months' imprisonment, to be followed by a five-year term of supervised release, and was fined $10,000.

1. Between November 1985 and January 1988, petitioner Holliday, a pharmacist at a Veterans Administration hospital in Los Angeles, California, stole quantities of Dilaudid and Diazepam from the hospital and mailed the drugs to petitioner Stone for sale and distribution in North Carolina. The shipments ceased in January 1988, when federal officials seized two parcels containing 20,000 tablets of Diazepam and 231 tablets of Dilaudid.[1] Pet. App. A2.

Diazepam, better known as Valium, is a Schedule IV controlled substance. Diazepam tablets consist of a mixture of pure drug and inert ingredients. The Diazepam tablets seized by federal officials in this case had a gross weight of 170 milligrams each, and contained either 5 or 10 milligrams of active ingredient. The total quantity of Diazepam tablets seized weighed 3,400 grams and contained 135 grams of active ingredient. C.A. App. 39-41.

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[1] The statement by the court of appeals that there were 23 Dilaudid tablets is a typographical error. See Pet. 4; C.A. App. 31.

Dilaudid, a highly addictive painkiller, is a Schedule II controlled substance.[2] Like Diazepam, Dilaudid tablets contain inert substances and quantities of pure drug. The Dilaudid tablets seized by federal officials in this case had a gross weight of 20.426 grams and contained .56 grams of active ingredient. C.A. App. 31, 34.

2. Petitioners were sentenced pursuant to the Sentencing Guidelines. Sentencing Guideline § 2D1.1 instructs that "[c]onsistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity" of the drug for purposes of calculating a base offense level. See Sentencing Guideline § 2D1.1(a)(3), at 2.39 n.* (Oct. 1987). The Guidelines provide for an escalating base offense level according to the weight of the drugs involved; a Drug Quantity Table contained in Guideline § 2D1.1 sets forth the applicable levels.

Consistent with the Guidelines, the district court calculated petitioners' base offense levels by considering the gross weight of the Dilaudid and Diazepam tablets, rather than by considering only the weight of active ingredients. After converting the total weight of the tablets to its heroin equivalent (see Application Note 10 of Guideline § 2D1.1, at 2.41), the court determined that the petitioners' base offense

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[2] Dilaudid is a narcotic belonging to the opium family. See 21 C.F.R. 1308.12, 1308.02(e)(1). The evidence in this case indicated that Dilaudid is called "pharmaceutical heroin" on the street, because it is very similar in chemical composition to "street heroin" and is highly abused. Gov't C.A. Br. 10.

level was 20.[3] Taking into account the remaining Guideline factors, the district court determined that petitioner Stone's Guideline range was 27 to 33 months' imprisonment, and that petitioner Holliday's Guideline range was 33 to 41 months' imprisonment.[4] The court then imposed the minimum Guideline sentence in each case.

The district court rejected petitioners' contention that only the pure drug contained in the tablets should have been considered in determining their base offense levels.[5] Petitioners acknowledged that for other controlled substances, the base offense level is calculated according to the total weight of the mixture containing a drug. In petitioners' view, however, only the weight of the pure drug should be considered

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[3] The offenses involved a total of 3,420.426 grams of Dilaudid and Diazepam, or the equivalent of 51.49 grams of heroin. Under the Sentencing Guidelines, offenses involving between 40 and 59 grams of heroin have a base offense level of 20.

[4] Stone's Guideline range was based on an adjusted offense level of 18 and a Criminal History Category of I. His adjusted offense level was derived from a base offense level of 20 with 2 points subtracted under Guideline § 3E1.1(a) for acceptance of responsibility. Holliday's Guideline range was derived from an adjusted offense level of 20 and a Criminal History Category of I. Her adjusted offense level was derived from a base offense level of 20 with 2 points added under Guideline § 3B1.3 for abuse of trust and 2 points subtracted for acceptance of responsibility.

[5] If only the pure quantity of Dilaudid and Diazepam had been considered, petitioners' base offense level would have been 12 because the drugs would be the equivalent of less than 5 grams of heroin. For Holliday, the resulting Guideline range would have been 10 to 16 months' imprisonment; for Stone the Guideline range would have been six to 12 months' imprisonment.

in calculating the Guidelines sentences for the pharmaceutical drugs involved here. The district court pointed out that the Sentencing Commission was aware of the differences between pharmaceutical drugs and other drugs when it promulgated the Guidelines, and the Guidelines explicitly require consideration of the gross weight for all drugs. C.A. App. 60-69, 90.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A5. Petitioners argued that the Guidelines' reliance on gross weight in setting base offense levels was inconsistent with the Controlled Substances Act, as amended in 1986 by the Anti-Drug Abuse Act. The court of appeals rejected that argument. Relying on *United States* v. *Daly*, 883 F.2d 313 (4th Cir. 1989), cert. denied, 110 S. Ct. 2622 (1990), the court held that the calculation of the base offense level for drugs under Sentencing Guideline § 2D1.1 according to the combined weight of the narcotics and any carrier medium was consistent with 21 U.S.C. 841. Pet. App. A3-A4.[6]

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[6] The court of appeals also rejected petitioners' claims that the Sentencing Guidelines violated the Due Process Clause of the Fifth Amendment; that a downward departure from the Guideline range was mandated because of the relatively low purity of the drugs; and that the sentence violated petitioner Stone's plea agreement. Pet. App. A4-A5. Petitioners do not pursue those claims here.

ARGUMENT

Petitioners renew their contention (Pet. 5-12) that the Sentencing Guidelines are inconsistent with the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, in calculating the Guideline range for Dilaudid and Diazepam according to the gross weight of the tablets rather than according to the net weight of the active ingredients in the tablets. Petitioners point to no conflict in the courts of appeals with respect to this issue, and they candidly acknowledge (Pet. 12) that "relatively few" cases present it. Moreover, the court of appeals was correct in concluding that the Sentencing Guidelines validly require consideration of the gross weight of the drugs seized in computing the base offense level.

As petitioners recognize (Pet. 9-10), the courts of appeals have consistently rejected claims that a sentence must be based upon the net weight of pure controlled substance rather than on the weight of the pure controlled substance plus the compound or carrier within which it is contained. See *United States* v. *Touby*, 909 F.2d 759 (3d Cir. 1990) (4-methylaminorex ("Euphoria")); *United States* v. *Marshall*, 908 F.2d 1312 (7th Cir. 1990) (en banc) (LSD); *United States* v. *Meitinger*, 901 F.2d 27 (4th Cir. 1990) (Dilaudid), petition for cert. pending, No. 90-5116; *United States* v. *Mueller*, 902 F.2d 336, 345 (5th Cir. 1990) (methamphetamine); *United States* v. *Skelton*, 901 F.2d 1204 (4th Cir. 1990) (PCP); *United States* v. *Elrod*, 898 F.2d 60 (6th Cir. 1990) (LSD), petition for cert. pending, No. 89-7689; *United States* v. *Bayerle*, 898 F.2d 28 (4th Cir. 1990) (Dilaudid); *United States* v. *Bishop*, 894 F.2d 981, 985-987 (8th Cir. 1990) (LSD), petition for cert. pending, No. 89-7708; *United States* v. *Daly*, 883 F.2d at 316-318

(LSD); *United States* v. *Taylor*, 868 F.2d 125, 127-128 (5th Cir. 1989) (LSD); *United States* v. *McGeehan*, 824 F.2d 677 (8th Cir. 1987) (LSD), cert. denied, 484 U.S. 1061 (1988). Cf. *United States* v. *Murphy*, 899 F.2d 714 (8th Cir. 1990) (purity of drugs not a factor in determining sentence); *United States* v. *Butler*, 895 F.2d 1016 (5th Cir. 1989) (statute and Guidelines required sentence based on total weight of 38 1/2 pound mixture that contained only small amount of methamphetamine); *United States* v. *Baker*, 883 F.2d 13 (5th Cir.) (same), cert. denied, 110 S. Ct. 517 (1989); *United States* v. *Whitehead*, 849 F.2d 849 (4th Cir.) (purity of drug not a factor), cert. denied, 488 U.S. 983 (1988). Petitioners nevertheless contend although consideration of gross weight is required for the drug offenses specifically enumerated in 21 U.S.C. 841(b)(1)(A) and (b)(1)(B), a different result is required for other drug offenses punishable under 21 U.S.C. 841 (b)(1)(C) and 21 U.S.C. 841(b)(2). That contention does not withstand analysis.

In enacting the Anti-Drug Abuse Act of 1986, Congress provided a range of escalating minimum penalties for persons who commit offenses involving increased weights of any "mixture or substance containing a detectable amount" of enumerated Schedule I and II controlled substances. 21 U.S.C. 841(b)(1)(A) and (b)(1)(B). That formulation plainly requires consideration of the gross weight of material containing a controlled substance, not the net weight of the controlled substance itself. In so providing, Congress expressly changed the prior law, which imposed penalties based only on the type of drug involved, rather than on its weight. 21 U.S.C.

841(b) (Supp. III 1985).[7] In addition to providing minimum penalties for offenses involving certain quantities of drugs, Congress also provided a catchall penalty provision for offenses involving lesser quantities of Schedule I and II controlled substances. 21 U.S.C. 841(b)(1)(C). This provision does not specifically describe the method for calculating the weight of the controlled substances for purposes of sentencing. Similarly, the penalty provision for offenses involving Schedule IV controlled substances does not specifically describe a method for calculating the weight of the controlled substances. 21 U.S.C. 841(b)(2).

In implementing the requirements of the Anti-Drug Abuse Act, the Sentencing Commission's Drug Quantity Table adopts the formulation that Congress set

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[7] The House Judiciary Committee explained the rationale for Congress's decision to change the method by which most controlled substances were considered for sentencing purposes, from the pure weight of the controlled substance to the total weight of any "mixture or substance" containing a detectable amount of a proscribed drug:

> After consulting with a number of DEA agents and prosecutors about the distribution patterns for these various drugs, the Committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. The Committee's statement of quantities is of mixtures, compounds or preparations that contain a detectable amount of the drug—these are not necessarily quantities of pure substance. One result of this market-oriented approach is that the Committee has not generally related these quantities to the number of doses of the drug that might be present in a given sample. The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain.

H.R. Rep. No. 845, 99th Cong., 2d Sess. Pt. I, at 11-12 (1986).

forth in the Act itself: the entire weight of a "mixture or substance containing a detectable amount" is considered. Thus, the Guidelines provide that "[t]he scale amounts for all controlled substances refer to the total weight of the controlled substance. Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity." Guidelines § 2D1.1(a)(3) Drug Quantity Table at 2.39 n.*.[8] See also *id.* at 2.41 Application Note 10 ("The Commission has used the sentences provided in, and the equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences.").[9]

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[8] The reference in the footnote to a "mixture *of* a compound" appears to be a typographical error in view of the Commission's use of the phrase "mixture *or* compound" in the following clause and next sentence of the footnote (emphasis added). This is especially true since the Anti-Drug Abuse Act, on which the Guidelines provision is modeled, is framed in the disjunctive.

[9] The recent clarifying amendments to the Guidelines are to the same effect. The footnote now accompanying § 2D1.1's Drug Quantity Table at 2.45 (1990), states:

> Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level. In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater.

Petitioners' challenge to the Sentencing Commission's approach draws no support from the text of the Anti-Drug Abuse Act; rather, that Act is fully consistent with the Commission's formulation. Nowhere does the Act require a different method of computing quantities for offenses under subsections (b)(1)(C) and (b)(2) than for other drug offenses. Moreover, the Act's structure supports, if not requires, the Commission's approach of applying a consistent standard to determining the quantities of a drug involved in an offense, and in graduating penalties accordingly.

Dilaudid is a Schedule II narcotic drug whose distribution is punishable under 21 U.S.C. 841 (b)(1)(C). Subsection (b)(1)(C) is not limited in its reach to the illegal manufacture, possession, or distribution of pharmaceutical products such as Dilaudid. Rather, that provision covers all Schedule I or II controlled substance offenses except as provided in Sections 841(b)(1)(A), 841(b)(1)(B), or 841(b)(1)(D). Consequently, the same controlled substances that are punishable by mandatory minimum sentences under subsections (b)(1)(A) and (b)(1)(B) are also punishable under subsection (b)(1)(C) when lesser quantities of total mixtures are involved. It follows, of course, that the "total mixture" approach for drugs such as heroin, cocaine, PCP, and LSD must be applied under subsection (b)(1)(C). Since Congress contemplated that sentences under subsection (b)(1)(C) for at least some drugs would be based on the total-mixture approach, the Commission was fully justified in applying that approach to all drug offenses punishable under subsection (b)(1)(C). There is no support in the statute or legislative history for applying two different methods for calculat-

ing the quantity of drugs involved under the same statutory provision.[10]

Similarly, there is no support for the view that Congress intended to preclude the Sentencing Commission's "total mixture" approach for drug offenses involving Diazepam. Diazepam is a Schedule IV drug whose distribution is punishable under 21 U.S.C. 841(b)(2). That provision states only that it applies to Schedule IV substances. Because Congress did not declare minimum sentences based on quantities of Schedule IV substances, the provision does not contain a formula for determining quantities of illegal substances. In view of Congress's failure specifically to address that issue, the Sentencing Commission reasonably applied the "total mixture" approach that was expressly set forth in other provisions of the Anti-Drug Abuse Act.

Not only does the Sentencing Commission's approach accord with the statute, it also provides an eminently sensible approach to calculating appropriate sentences according to the relative seriousness of the offense. Petitioners are therefore incorrect in asserting (Pet. 12) that the Commission has failed to determine sentences that comport with the purposes

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[10] Petitioners recognize that *United States* v. *Gurgiolo*, 894 F.2d 56, 61 (3d Cir. 1990), held that the "total weight" approach applies under Section 841(b)(1)(C), but err in contending (Pet. 10-11) that the court's conclusion resulted from a misquotation of the statute. The court simply recognized that Sections 841(b)(1)(A) and 841(b)(1)(B) require consideration of the total amount of a mixture or substance containing a detectable quantity of cocaine, and that the same approach should apply with respect to cocaine offenses under Section 841(b)(1)(C). The court noted that "section 841 does not create a clear distinction between the method of weighing Schedule II substances and the method of weighing Schedule III and IV substances." *Gurgiolo*, 894 F.2d at 61.

of the Sentencing Reform Act. See 18 U.S.C. 3553(a). Providing for a base offense level according to the total weight of tablets containing Diazepam and Dilaudid is consistent with the way that carrier mediums and cutting agents for other controlled substances are treated. "Drugs are rarely taken in undiluted form"; instead, "[t]he active agent is combined with inactive ones." *United States* v. *Rose*, 881 F.2d 386, 388 (7th Cir. 1989). Dilaudid and Diazepam are no exceptions. Although it is true that the weight of the inert substance may exceed the weight of the pure drug, and that the same total weight may contain different amounts of pure drug, that observation applies equally to substances such as heroin, cocaine, and LSD. See *United States* v. *Marshall*, 908 F.2d at 1316. The drug offender himself determines whether to traffic in low dosage or high dosage tablets; a large number of low dosage tablets may simply indicate an intention to reach a larger number of relatively modest users. The Sentencing Commission could rationally conclude that the seriousness of any offense involving a controlled substance is best measured by a total mixture approach.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1990

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